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Supreme Court of the United States

OCTOBER TERM, 1955

No. 496

NATIONAL LAWYERS GUILD,

Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Nothing contained in respondent's brief touches on the importance of a decision by this Court on the issue of exhaustion of administrative remedies here presented. No one can question the soundness of that doctrine as a general rule of judicial administration. However, it seems incredible that it should be available as a cloak under which administrative tyranny might proceed without judicial scrutiny. Here, in addition to the fundamental issue of the power to list, the case presents three reasons which render the exhaustion doctrine inapplicable—surely they present substantial questions for this Court's consideration. At the risk of repeating some of what we have said in our petition, we submit the following:

a. Has respondent the right to proceed by interrogatories, especially interrogatories of the character here presented, which are designed to induce default and invade privacy? Unless petitioner can make that challenge now it will never be able to make it effectively, for it will have to

answer the interrogatories or be listed by default—as indeed, as respondent will admit, has happened in the case of other organizations.

Where such a precondition is imposed as a prerequisite to obtaining administrative hearings, the doctrine of exhaustion cannot reasonably be applied. As a recent comment on the general question of exhaustion points out:

> "Granting that a final administrative decision ought normally to be required before a court will pass upon the question of interpretation, an administrative decision should not be a prerequisite to judicial action if the plaintiff's only means of getting an administrative decision is by risking the very result he is most interested in avoiding." (Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harv. L. R. 1122, 1326, at 1352).

b. Is the procedure consistent with due process, bearing in mind that the regulations contain provisions which, at the least, permit listing without even a hearing (Reg. 41.4. 8(a) Pet. p. 41)? And in this connection is it an answer to say that perhaps respondent will not exercise the power given by his own rules and assure due process? How, for instance, would petitioner ever know whether respondent had exercised the power (Reg. 41.8(i) Pet. p. 42) to act on undisclosed evidence?

c. Has respondent so prejudged the case as to disqualify himself? Must petitioner run the risk of being listed before it can have that issue determined? And if that cannot be passed on now it may be too late.

To all these problems respondent answers only that petitioner's complaint is premature, because it may not be listed. That is no answer, for it ignores the situation which is likely to arise should it be listed. Certainly the doctrine of exhaustion has never been pressed as far as it has been here.

When a bar association which could not hope to survive a public and official branding as "subversive" finds itself in a situation in which basic First Amendment rights are gravely threatened, when it is confronted with administrative proceedings lacking all statutory authority, when to secure the doubtful privilege of an administrative hearing before a public official who, it charges, has publicly prejudged the outcome, it is required to answer interrogatories some of which have been characterized by the court below as "impossible of answer", surely it can say to this Court: The doctrine of "exhaustion" cannot be automatically applied. Its application in these circumstances presents a serious question for consideration by this Court.

1. We cannot tell, from the casual reference (Brief p. 3) to the statutes listed in the Executive Order, whether respondent claims that these authorize the listing process. If so, then clearly our contention that they do not brings this case within the rule of *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, so that that issue must be judicially determined before exhaustion of the administrative process is necessary. And if respondent does not claim that any of those statutes authorize the proceeding, then the courts are confronted with the classic occasion for judicial intervention: unauthorized executive action.

2. The cases cited (pp. 16, 17) do not support respondent. In each of them the Court held that the administrative proceeding was authorized by a statute. That some of the statutes made no provision for judicial review, or even for administrative hearings, is not the controlling factor. And the Ninth Circuit in *Parker* v. *Lester* (No. 14,081 decided October 26, 1955), has not interpreted this Court's position as does the Solicitor General.

In the *Parker* case the issue related to the procedures established for screening seamen under the Magnuson Act (50 USC 191, 192, 194). The Court held that the statute

authorized a screening program, but that the regulations issued by the Coast Guard under the statute denied seamen rights which were of the essence of due process. The Court held that it was not necessary for the seamen who challenged these regulations to exhaust their administrative remedies and issued an injunction restraining their enforcement.

Judge Pope discussed the exhaustion doctrine at length and accepted one of the basic contentions we have made in the case at bar, namely, that the doctrine of exhaustion of administrative remedies has application only where there is some statutory provision for judicial review after administrative action or some special tribunal has been established to deal with the subject (such as the Tax Court, in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, or the Emergency Court, in *Yakus* v. *United States*, 321 U. S. 414).

Judge Pope said:

> "When the nature of plaintiffs' action is considered, it is apparent that no rule relating to prior exhaustion of administrative remedies can deprive the court of authority to pass upon the issues here present. The doctrine of exhaustion of administrative remedies has application in certain types of cases, all of which are substantially different than that presented here. Where an action is brought to obtain a review by the court of an administrative order, as for instance, the judicial review authorized by the Administrative Procedure Act (Sec. 1009, Title 5 U. S. C. A.), or 'final agency action', and the remedy before the agency has not been concluded, of course the right to review has not arisen. The case is not 'ripe for review'. Cf. Federal Power Comm'n v. Edison Co., 304 U. S. 375. And where in connection with such an administrative proceeding Congress has provided that the remedy before the administrative body is exclusive and has created means for review or enforcement of the board's order in a court, the inference is unavoidable that the statutory procedure is exclusive and that trial of issues in the au-

thorized manner cannot be short-circuited through an independent action for injunction in the district court. Meyers v. Bethlehem Corp., 303 U. S. 41.

"Manifestly this is not such a case. The proceeding in the lower court was in no sense a proceeding designed to review administrative action. It cannot be, for the Magnuson Act, the executive order and the regulations contemplate no such review. Indeed, it is the position of the defendants, with which the trial court agreed, that the provisions of the Administrative Procedure Act, including its provisions for judicial review, have no application here." (Slip Opinion, pp. 6, 7.)

These observations all have direct application to the case at bar.

Judge Pope stressed, moreover, the fact that the constitutional validity of the regulations was under direct attack; that no facts were in issue, citing *Great Northern Ry. v. Merchants' Elevator Co.*, 259 U. S. 285 (Slip Opinion, p. 8). Here also that is the situation—leaving to one side the question of respondent's prejudgment which, if an issue of fact, could not be disposed of on summary judgment.

Judge Pope noted also that the administrative tribunal had no competence to pass on the questions of due process there raised. So, of course, respondent has no competence to pass on the challenge to the authority of the President.

It is true that Judge Pope sought to distinguish the case at bar (Slip Opinion, p. 10, note 11a, quoted in respondent's brief, p. 18, note 8) on the ground that the regulations before him were invalid on their face, whereas those promulgated by respondent were not necessarily so. Whether respondent's procedures, which petitioner challenges, are invalid on their face or not, there are at least two reasons why the principle of the *Parker* case applies here. In the first place, petitioner challenges respondent's right to require it to answer interrogatories—an issue that cannot depend on the conduct of the hearing to which it is pre-

requisite. In the second place, our chief challenge is to the validity of the proceeding itself, a proceeding not authorized by any statute, whereas in the *Parker* case there was such a statute. The conditions which there led the court to rule that administrative remedies need not be exhausted should apply *a fortiori*.

To that extent, therefore, there appears to be an inconsistency between the positions taken by the Ninth Circuit and the District of Columbia Circuit which should be resolved by this Court.

3. Respondent (Brief, pp. 15, 16) seeks to draw an inference from this Court's decisions in the *Joint Anti-Fascist* case (341 U. S. 123) and the *Adler* case (342 U. S. 485) that the issue of power to list has already been decided by this Court. It is impossible to understand the relevance of the *Adler* case in this context. For there the Court was considering a state statute which was narrowly confined both as to substance and procedures—only organizations found, after hearing, to advocate the overthrow of the government by force could be listed. Here we have no statute and no definition of "communist" or "subversive" which has legal content. Moreover, and more significantly, this Court was faced, in *Adler*, with a situation where no organization had been listed or threatened with listing. Noting that the statute afforded organizations full notice and hearing and opportunities for judicial review (including review of the basic question of constitutional power), the Court directed its attention solely to the question of whether, after an organization had been validly and constitutionally listed, a teacher who was found to be a member of it could validly be discharged. The Court did not have before it and so, of course, did not consider what objections an organization might raise on substantive or procedural grounds to prevent such listing and it certainly did not consider whether an organization threatened with listing could enjoin administrative procedures until the courts had had opportunity to consider the issues of power and procedure.

And surely no inference as to the validity of the listing procedure can be drawn from the fact that a majority of this Court in the *Joint Anti-Fascist* case took the view that the procedures for listing which were then before it were so clearly invalid that the Court need not *reach* the constitutional question of power. That is in line with the Court's traditional desire to avoid unnecessary decision of constitutional issues. Cf. *Peters* v. *Hobby*, 349 U. S. 331; *Neese* v. *Southern Railway Co.*, decided November 21, 1955.

Surely the time has come for this Court to pass on the power of any agency of government to wield this lethal blacklist weapon. The organizations which participated in the original case have found that it was not the remedies, but the organizations themselves that have been "exhausted". If this application is denied petitioner may suffer a like fate.

4. None of the cases cited by respondent on the subject of procedures (pp. 17, 18) dealt with any comparable situation. Nor does the argument even remotely deal with the right of respondent to condition a hearing on the furnishing of satisfactory answers to interrogatories. Respondent's reference (p. 20, fn. 9) to the comment of the court below on the question of modification of interrogatories comes with ill grace. For he is aware—as the court below may not have been—that the very questions which the court quoted to demonstrate that the questions were "difficult, if not impossible, of answer" and that modification should be made and probably would be if request were made to respondent were questions which petitioner had asked respondent to modify and which he *did* modify. It was the *modified* questions which the court considered. But the modification so made by respondent in the quoted questions consisted of such changes as the addition of the words "To your knowledge" in question No. 60 (originally 61) and the deletion of the adverb "ever" and the substitution of the words "since 1946" in question No. 64 (originally 66): "Has the NLG or any of the * * * chapters thereof, passed

an anti-Communist or anti-Soviet resolution since 1946" (cf. I 62, 63 with II 64, 65).

5. Respondent is not correct in stating (p. 19) that this Court has ever dealt with the issue of prejudgment as here presented. In most of the cases cited nothing more was claimed than general statements of opinion, not directed at the particular litigant. And in *Fahey* v. *Mallonee* (332 U. S. 245) this Court expressly refrained from passing on the charge of malice which had not been determined below; it left that issue open. Here, moreover, the record compels the conclusion that prejudgment has been established; certainly the claim is not premature. At the very least petitioner was entitled to have the issue determined at a trial and not disposed of on summary judgment.

6. Finally respondent chides petitioner (p. 20) for its supposed disregard of equal justice in seeking "special consideration" as a bar association. We think it is fundamental to the concept of "equal justice" that each case be decided on the facts relevant to it. Not only petitioner but the public as well will suffer from respondent's proposed listing precisely because of petitioner's status as a bar association, an organization of attorneys dedicated to the protection of public rights. It is for this broader reason of concern to the public that this Court should give consideration to the fact that petitioner is a bar association.

CONCLUSION *

Substantial issues of public importance are here presented which call for the exercise of this Court's power to review. The petition should be granted.

Respectfully submitted,

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* In amplification of the material submitted with our petition (Appendix C, pp. 44, 49) we call the Court's attention to testimony given on the same subject on November 17, 1955 before the Senate Subcommittee on Constitutional Rights (see New York Times, Nov. 18, 1955, p. 19, col. 4).

The Times said: "An incomplete check by the legislative reference bureau of the Library of Congress showed that at least thirteen states, the District of Columbia, Hawaii and four cities had decreed that members of the organizations listed were subject to suspicion as enemies of the country."